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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

BEFORE THE
Federal Communications Commission
WASHINGTON, D.C. 20554

In the Matter of

Inquiry on Competitive
Bidding Process for Report
to Congress

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Docket No. WT 97-150

COMMENTS OF SOUTHERN COMMUNICATIONS SERVICES, INC.

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

By: Carole C. Harris
Christine M. Gill
Daniel R. Ball

McDermott, Will & Emery
1850 K Street, N.W.
Washington, D.C. 20006
202-887-8000

Dated: August 1, 1997

Attorneys for
Southern Communications
Services, Inc.

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TABLE OF CONTENTS

EXECUTIVE SUMMARY	ii
I. INTRODUCTION	1
II. COMMENTS	4
A. A Real Auction Cannot Occur When Spectrum Is Predominately Occupied By One Company	4
B. Auction Rules Do Not Encourage Service To Rural Areas	5
C. FCC Lacks Statutory Authority to Conduct an "Incumbents Only" Auction	7
D. Poorly Conceived Auctions Foster an Anticompetitive Environment	9
E. 800 MHz Auction Violates Congressional Requirement that Similar Licensees be Subject to Similar Regulatory Requirements	11
III. CONCLUSION	13

EXECUTIVE SUMMARY

The upcoming auction of the upper 200 channels of 800 MHz SMR spectrum is an example of an auction which does not serve any of the objectives which Congress in set giving the FCC auction authority. As was amply demonstrated in the record in the 800 MHz auction proceeding and as is readily admitted by the Commission, this spectrum is already fully licensed. Therefore, this is not a real auction of spectrum at all. Furthermore, the only entities with any practical ability to participate in this auction are the incumbents. This case is particularly egregious because a single company, Nextel, is licensed for almost all of the spectrum which is to be auctioned by the Commission. Not only do other SMR providers not have an incentive to go to the auction, they are discriminated against because they will have no ability to obtain the favored regulatory treatment which the auction winner will acquire, such as liberal construction schedules.

The Commission's auction rules also discouraged service to rural areas. For example, the construction requirements for the 800 MHz auction winners merely require that licensees cover two-thirds of the population of their market within five years. As a result, the auction winner will be able to satisfy construction requirement without ever serving rural areas. Other companies such as Southern, who do serve rural areas, are faced with

onerous construction requirements that actually discourage service to rural areas. This is plainly contrary to the intent of Congress that its auction policies encourage providers to bring advanced technology to rural parts of the country.

Southern believes that the 800 MHz SMR auction has an example of a poorly conceived auction that will have anti-competitive results that disserve the public interest. Furthermore, these auctions are inconsistent with very clear Congressional directives that auctions be fair to companies that receive their licenses through regular licensing procedures; that auctions result in a diversity rather than a concentration of ownership; and promote service in rural areas.

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COMMENTS OF SOUTHERN COMMUNICATIONS SERVICES, INC.

In this proceeding, the Commission seeks comments on how well its competitive bidding rules have met Congressional directives including delivery of new and competitive services to rural and/or underserved areas. The Commission also seeks comment on the effects of geographic area sizes, construction requirements, and partitioning and disaggregation on the delivery of new and competitive services to rural and/or underserved areas.

I. INTRODUCTION

1. Southern Communications Services, Inc. ("Southern") is a Specialized Mobile Radio ("SMR") licensee operating a wide-area, digital enhanced 800 MHz system throughout its regional service area. Southern has invested millions of dollars in this

state-of-the-art digital SMR system and is a commercially-viable competitor to other wide-area SMR licensees. A portion of Southern's 800 MHz SMR system provides enhanced dispatch communications for internal use by its operating companies. For example, this system transmits local dispatch communications to service crews who respond to calls concerning substations and power lines in routine and emergency situations. Southern also provides SMR service to state and local governments, utilities, industrial and commercial users and other customers who need the enhanced dispatch, two-way voice, and data transmission capabilities of Southern's wide-area SMR system. The Southern 800 MHz SMR system provides service for these customers in rural and urban areas corresponding with its utility system operations.

2. Southern has been an active participant in the preparations for auction of 800 MHz spectrum, filing comments in every phase of the Commission's proceedings. Southern therefore wishes to provide the Commission with its perspective on the proposed auction of 800 MHz SMR spectrum. Southern believes that this is an example of an auction that does not achieve the objectives Congress sought to achieve when it give the Commission auction authority. Instead, the auction design confers a special and unduly discriminatory benefit on a single favored incumbent licensee, Nextel.

3. Auction authority was primarily intended to streamline the licensing process in situations where more than one applicant is seeking a license (mutual exclusivity). In the 800 MHz SMR band, the FCC has essentially used this authority to "churn" the spectrum, forcing existing licensees who are providing SMR service to "buy" the spectrum they are already using, in order to provide the services they are already providing. This is not an auction in the same sense as the PCS auctions, but merely a sale of geographic marketing rights to incumbents. In return for this "purchase" the auction winner receives new construction flexibility and the right to "relocate" any other licensee on the spectrum. The auction the upper 200 800 MHz channels is particularly distorted because one company, Nextel, is the incumbent on the vast majority of the channels and is the only entity positioned to gain the geographic marketing and construction rights that the Commission is really selling at this auction.

4. Southern is particularly concerned with this 800 MHz auction because Southern is predominantly licensed on unauctionible 800 MHz channels. Because Nextel is licensed on almost all of the auctionible channels in Southern's service area, Southern has no opportunity to gain channels through bidding against Nextel. Nextel, however, will gain special and discriminatory construction relief through the auction, relief that the Bureau has to date denied Southern.

II. COMMENTS

5. Congress authorized the Commission to use competitive bidding in certain cases where there were mutually exclusive applications.^{1/} At the same time, Congress required that all auctions "seek to promote . . . the following objectives: (A) the development and rapid deployment of new technologies, products, and services for the benefit of the public, including those residing in rural areas; . . . and (D) efficient and intensive use of the electromagnetic spectrum."^{2/} As an analysis of the FCC's rules for auctioning 800 MHz spectrum demonstrates, the FCC has forsaken these Congressional objectives.

A. A Real Auction Cannot Occur When Spectrum Is Predominately Occupied By One Company.

6. As was documented extensively in the record on the proposed auction of the upper 200 800 MHz channels, when spectrum is heavily encumbered by one entity (as is the case here), a proposed auction can only create greater concentration of spectrum by that one company. In this particular case, it is difficult to see how any significant revenue can be gained through such an auction because when spectrum to be auctioned is

^{1/} 47 U.S.C. § 309(j).

^{2/} Id.

already held by one party, other entities have no incentive or rational basis for participating in such an auction.

7. The Commission itself admits this throughout its decision in the First Report and Order,^{3/} where it states that the 800 MHz SMR spectrum is heavily licensed, and virtually fully occupied. With this a well known fact, Southern questions the Commission's attempt to auction this spectrum at all. Simply stated, there is insufficient spectrum available to support any new entrants. Without spectrum available for licensing, the auction becomes simply a mechanism for the incumbent (in this case Nextel) to achieve favored regulatory treatment. In this case the auction winner gains the right to move competitors off the channels and a very liberal construction schedule. This has a distorting effect on the market when competitors who cannot participate in what is essentially an "incumbents auction" remain subject to more onerous "old" licensing and construction requirements.

^{3/} In the Matter of Amendment of Part 90 of the Commission's Rules to Facilitate Future Development of SMR Systems in the 800 MHz Frequency Band and Implementation of Section 309(j) of the Communications Act -- Competitive Bidding, PR Docket No. 93-144 and PP Docket 93-253, First Report and Order, Eighth Report and Order and Second Notice of Proposed Rule Making, 61 Fed. Reg. 6212 (1996). ("First Report and Order").

B. Auction Rules Do Not Encourage Service To Rural Areas

8. The Commission's construction requirements for 800 MHz auction winners require merely that licensees cover two thirds of the population in their economic area (EA) and use half of the discrete channels available within five years. As a result, an auction winner is able to fully satisfy its construction requirements merely by providing service to densely populated urban areas. While this may be the most economically efficient course of action for the auction winner, it is unquestionably inconsistent with the Congressional directive that the Commission promote service to rural areas.

9. In addition, in a perverse way, the Commission's policies actually discourage service to rural areas. In the case of the 800 MHz auction, the winner will likely not be required to ever build out in rural areas. Instead, the winner will be able to keep its rural spectrum off the market and thereby prevent competitors from serving these areas as well. In contrast, for non-auction winners who may wish to serve rural areas, the Commission's rules impose heavy burdens. The Commission's treatment of Southern is a case in point. Southern has invested over \$200 million to design, develop and construct its wide-area SMR system, providing advanced digital service to the public in urban areas as well as rural areas generally overlooked by other SMRs. Southern is committed to providing a communications system

that meets the reliability standards of public utilities, federal, state, and local governments and emergency management agencies. For example, the Alabama Emergency Management Association is among its many customers. As a site-by-site licensee, Southern must commit to a rigid, FCC-imposed build-out schedule of its entire system, regardless of market conditions, or lose its spectrum. If it were held to the same construction standards as an auction winner, Southern would already have met its construction requirements under Commission regulations. Southern would then be able to continue developing both its urban and rural system in response to the needs of consumers, taking advantage of developments in technology and maintaining a flexible and responsive telecommunications system unique in the rural areas it serves.

C. FCC Lacks Statutory Authority to Conduct an "Incumbents Only" Auction

10. The "rules of construction" spelled out by Congress in its grant of auction authority require the Commission to continue to use "engineering solutions, negotiation, threshold qualifications, service regulations, and other means to avoid mutual exclusivity in application and licensing proceedings.^{4/} Rather than proposing ways to avoid mutual exclusivity, the Commission develops policies which create mutual exclusivity in

^{4/} 47 U.S.C. § 309 (j)(6)(E).

order to justify auctions to raise revenues. Moreover, Southern does not believe that the Commission has the legal authority to conduct an auction under the circumstances where there is no "spectrum" available because the existing spectrum is fully licensed. Section 309 (j)(1) provides the statutory authority for the auction mechanism; that section provides, in relevant part:

If mutually exclusive applications are accepted for filing for any initial license or construction permit which will involve a use of the electromagnetic spectrum described in paragraph (2), then the Commission shall have the authority, subject to paragraph (10), to grant such license or permit to a qualified applicant through the use of a system of competitive bidding that meets the requirements of this subsection.

The express language of § 309(j) confers authority to conduct auctions only upon the filing of exclusive applications for an initial license, and only for licenses involving use of the spectrum. The significance of the former requirement is made clear by the fact that, in tailoring § 309(j), Congress expressly excluded applications for renewal or modifications from the auction process.^{5/} Congress clearly chose not to expose every license to the possibility of forced relicensing by auction. The auction mechanism has no application or relevance to spectrum which is already occupied and licensed. The statute, by its

^{5/} Report of the Committee on the Budget, House of Representatives, 253 (1993).

plain language, only authorizes the use of the auction mechanism to license spectrum which, aside from the competing application[s], is otherwise available. Furthermore, Congress has specifically directed the Commission:

"In making a decision pursuant to Section 303 (c) to assign a band of frequencies to use for which licenses . . . will be issued pursuant to this subsection, and in prescribing regulations pursuant to . . . this subsection, the Commission may not base a finding of public interest, convenience and necessity on the expectation of federal revenues from the use of a system of competitive bidding."^{9/}

D. Poorly Conceived Auctions Foster an Anticompetitive Environment

11. Auctions which serve only to place a dominant incumbent in a more favored position are ultimately anticompetitive, contrary to Congress' intent. The auction process for the upper 200 800 MHz channels, for example, is designed to result in one company becoming the only nationwide winner contrary to Congress' instruction to use auction to create diversity of ownership.^{1/} Furthermore, this auction is not designed to generate revenue because, as a general rule, where there are few bidders, minimal bids will be generated. In this auction many markets may even be obtained for free by the incumbent. In which case the results of this auction could be worse than the recent Wireless

^{9/} Pub. L. No. 103-66. Title VI, § 6002(a), 107 Stat. 312, 390 (1993) (emphasis added).

^{1/} Auctions are intended to result in more diversity of ownership, not less. 47 U.S.C. § 309(j)(3)(B).

Communications Services (WCS) auction where some markets were sold for one dollar. However, because the auction winner will receive a liberal construction schedule and regulatory tools to force competitors to other spectrum, or to stifle their growth, an anticompetitive environment is automatically created. This type of regulatory favoritism has no place in the auction process. Congress specifically directed the Commission not to treat auction winners differently from similarly situated competitors.^{8/}

12. Furthermore, the Commission is required to consider the antitrust consequences of its proposal and weigh the consequences with other public interest factors: "we are required to consider anticompetitive consequences as one part of our public interest calculus."^{9/} Failure to do so directly contravenes the public interest requirement of the Communications Act.

13. Although the FCC strenuously denies that it is operating under an "auction for auction's sake" mentality, there is no other rational explanation for its proposal to auction the heavily incumbered 800 MHz channels. From a competitive standpoint, no benefit is gained by driving out of business small SMR operators who have created a niche markets for themselves.

^{8/} See 47 U.S.C. § 309(j)(6)(D); House Conf. Rep. at 485.

^{9/} In re Contel Corp., 68 R.R. 2d 1260 (1991) and United States v. F.C.C., 652 F.2d 72 (D.C. Cir. 1980)).

No benefit is derived by requiring SMR operators to pay for spectrum (via auctions) on which they are already licensed simply to maintain their authorizations. Unfortunately, the Commission continues to repeat the mantra that "licenses are awarded via the auction process to the applicant who values them the most". How does this apply in auction where only one entity has an incentive to bid? What the Commission is most likely to accomplish is disruption in service to the public and stifled growth for existing SMR businesses.

E. 800 MHz Auction Violates Congressional Requirement that Similar Licensees be Subject to Similar Regulatory Requirements

14. In passing the Budget Act, Congress mandated regulatory parity in the Commercial Mobile Radio Service regulatory scheme. According to the legislative history, Congress intended "to provide that equivalent mobile services are regulated in the same manner."^{10/} It directs the Commission to review its rules and regulations to achieve regulatory parity among services that are substantially similar.^{11/} Because Southern is a CMRS provider operating in the 800 MHz spectrum band, and because the Commission determined that such CMRS providers effectively compete with PCS and cellular, the Budget Act requires that

^{10/} See H.R. Rep. No. 111, 103d Cong. 1st Sess. 253, 259 (1993), reprinted in 1993 U.S.C.C.A.N. 572, 586.

^{11/} Id.

Southern have the same type of construction flexibility that the Commission's auction rules will give to auction winners. The Budget Act directs the Commission to review its rules and regulations to achieve regulatory parity among services that are "substantially similar."

15. Throughout the 800 MHz auction rulemaking, the Commission has refused to seriously consider the issue of regulatory parity.^{12/} In its Petition for Reconsideration of the First Report & Order, Southern explained that it was entitled to regulatory parity with other CMRS providers. The Commission's response? "[A]ny incumbent who seeks the "superior" spectrum management rights of an EA licensee has the same opportunity to obtain it as any other applicant: by bidding for the EA license through the auction process."^{13/} The Commission's response that the opportunity to bid is fair and equal is without foundation and is absolutely contrary to the reality that Nextel alone can benefit from the auction. Not only did the FCC completely ignore the Congressional requirement for regulatory parity, it also ignored the fact the upper 200 channels at 800 MHz are predominantly licensed to one entity. This fact (together with

^{12/} The Commission has found that wide-area SMR service is substantially similar to other CMRS services and is therefore entitled to "comparable" technical and operational rules. CRMS Third Report & Order (hereinafter "Third R&O") ¶ ¶ 10-14.

^{13/} Memorandum Opinion & Order on Reconsideration, FCC 97-224, released July 10, 1997, at fn. 29.

the requirement of mandatory relocation) makes it totally infeasible for non-incumbents to enter this auction.

III. CONCLUSION

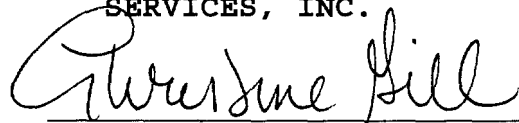
16. Southern supports the Commission's use of competitive bidding to award spectrum authorizations when such a procedure promotes the public interest and comports with Congressional directives. As demonstrated by the planned auctions of 800 MHz spectrum, however, the Commission appears intent on using auctions even when doing so is contrary to the public interest. Specifically, the Commission has failed to adequately consider:

- making service available to rural communities;
- promoting efficient use of spectrum;
- protecting existing competition from Commission-protected monopoly spectrum holders; and
- preventing the market-distorting impact of treating differently providers of similar services based upon whether or not a provider is an auction winner.

17. A reassessment of these important public interest criteria is essential to the use of auctions for the allocation of America's spectrum assets in the public interest.

Respectfully submitted,

**SOUTHERN COMMUNICATIONS
SERVICES, INC.**

A handwritten signature in cursive script, appearing to read "Carole C. Harris", written over a horizontal line.

Carole C. Harris
Christine M. Gill
Daniel R. Ball

McDermott, Will & Emery
1850 K Street, N.W., Suite 500
Washington, D.C. 20006
(202) 887-8000

Attorneys for
Southern Communications
Services, Inc.

CERTIFICATE OF SERVICE

I hereby certify that on this 1st day of August, 1997, I caused true and correct copies of the COMMENTS OF SOUTHERN COMMUNICATIONS SERVICES, INC. to be served via hand delivery on:

Chairman Reed E. Hundt
Federal Communications Commission
1919 M Street, N.W.
Room 814
Washington, DC 20554

Commissioner James H. Quello
Federal Communications Commission
1919 M Street, N.W.
Room 802
Washington, DC 20554

Commissioner Rachelle B. Chong
Federal Communications Commission
1919 M Street, N.W.
Room 844
Washington, DC 20554

Commissioner Susan Ness
Federal Communications Commission
1919 M Street, N.W.
Room 832
Washington, DC 20554


Christine S. Biso